No. 1323

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

FIRST NATIONAL BANK of Council Bluffs, Iowa, *Plaintiff in Error,*

vs.

J. A. MOORE, *Defendant in Error.*

BRIEF OF PLAINTIFF IN ERROR

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

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STATEMENT OF THE CASE.

This action was brought to recover upon three promissory notes made by the defendant in error, to the assignor of plaintiff in error, the Citizen's State Bank of Council Bluffs, Iowa, dated January 2, 1897, two of them for $2,500.00 each and one of them for $800.00, and all due six months after date.

The notes are set out in full in plaintiff's amended complaint as well as the assignment and delivery. No question arises in this case as to the execution and the assignment and delivery of these notes by the Citizen's State Bank to the plaintiff in error.

The action was begun September 21st, 1903, and it is alleged in the 7th paragraph in each cause of action in the amended complaint that at the time the notes matured the defendant in error was not a resident or inhabitant of the State of Washington, nor of the State of Iowa, nor to be found therein, and that less than six years prior to September 21st, 1903, he came into and became a citizen and resident of the State of Washington, and had been such for less than six years prior to the commencement of the action.

It is also alleged in the succeeding paragraph that prior to July 2, 1903, and after the maturity of the notes, Moore, in writing, acknowledged the indebtedness and obligation of the notes.

It was conceded by the defendant at the trial in his own testimony that he did not live in the State of Washington and was not in the State between July, 1897, and November and December, 1897, and the Court did not submit that question to the jury, as the defense was abandoned.

At the trial the citizenship of the plaintiff in error and the assignor was admitted as alleged in the amended complaint.

The defense of the defendant in brief is that the notes sued upon were renewals of an original note made March, 1893, in favor of one George J. Crane, for the sum of $5,000.00, and that this original note was obtained from the defendant in error by fraud and false representations, about as follows:

That said Crane and one Dr. F. P. Bellinger represented to defendant in error that they were the owners of a formula or specific for the cure of liquor, tobacco, cocaine, morphine and other habits, and that the same was a success and a thorough cure for these habits, and that in consequence of the representations of Crane and Bellinger it was agreed between them and the defendant in error that a corporation should be formed to take over said cure and exploit the same, and that defendant in error should pay $5,000.00 for one-fifth of the capital stock of such corporation; that the corporation was formed under the laws of the State of Washington, having a capital of one million dollars, and that the sole and only consideration for said note was the purchase of one-fifth of the capital stock of said company; that Dr. F. P. Bellinger did not in fact have any cure, and that the entire scheme was a fraud. The defendant in error further set up that the Citizen's State Bank received the original note from Crane with knowledge of the fraud practiced upon Moore in obtaining the note, and that Moore was induced to renew the same by the representations of the Citizen's State Bank; that it had purchased the note in the usual course of business without any knowledge of fraud or other infirmity in the consideration and that Moore did not know of the fraud practiced upon him until 1902.

The plaintiff in error replied, denying all all of the allegations of the defense except that it admitted the formation of the corporation known as the Bellinger German Remedy Company, and the fact that the notes in suit were renewals of the original $5,000.00 note.

Upon the trial plaintiff in error introduced in evidence the three notes sued upon, made proof that the same were delivered to it in December, 1899, together with all the other commercial paper and assets of the Citizen's State

Bank, and had since been in its possession, and also proved the execution of the written assignment pleaded and introduced that in evidence.

It was agreed that the amount of the attorney's fees should be left to the Court in the event of the verdict for the plaintiff.

Proof was offered of the absence of the defendant in error from the State of Washington between July 1 and December, 1897, and numerous written acknowledgements of the notes by the defendant were also offered in evidence.

As stated above, the defense of the statute of limitations was later abandoned by the defendant upon his own testimony and was eliminated from the case.

The citizenship of plaintiff in error and the assignor was admitted.

Plaintiff in error then rested.

After the making of an opening statement by the defendant's counsel, plaintiff in error objected to the introduction of any evidence in support of the 3rd and 4th alleged affirmative defenses pleaded in the answer, for the reason that no sufficient defense was pleaded in either of these defense.

In these affirmative defenses it appears that the contract between the defendant in error and Crane and Bellinger was for the purchase of the stock in the corporation, and there was no offer to return the stock, no offer of recision and no counterclaim is pleaded.

This objection was by the Court overruled and objection saved.

The defendant gave evidence that Crane and Bellinger procured one Austin to interest defendant in error in the promotion and sale of the alleged cure and that he fully

investigated the cure both personally and through others, and that Crane and Bellinger did represent to him that the cure was a good one, and that they owned it.

By the deposition of Dr. Bellinger taken on behalf of the defendant in error, the formula was disclosed and defendant in error offered expert testimony of druggists and physicians to the effect that the formula as stated by Dr. Bellinger was not intelligible, and could not be compounded, and was, in short, no formula.

The defendant in error also introduced the deposition of Charles R. Hannan, former cashier of the Citizen's Bank, to the effect that at the time of obtaining the original note for $5,000.00 from Crane, "he knew of the transaction Crane had had with Moore," and that "he knew that it was given for the recipe and privilege of using a recipe for an opium and whisky cure," but went no further. Did not state anything of the details of his knowledge.

Hannan testified that what he learned from Crane he learned in the office of the Bank in Council Bluffs in conversation with him.

Plaintiff in error showed by George J. Crane in rebuttal that he had not seen Hannan for some months prior to obtaining the original $5,000.00 note from Moore, and that when he last saw Hannan before this deal he was not acquainted with Moore and did not know of him, and that he did not again see Hannan until after the note matured, and that immediately after obtaining the note he sent it to Council Bluffs by mail, and that he never at any time disclosed to Hannan the nature of the consideration for the note. He also testified that Moore relied upon his personal investigation of the cure. That Crane and Bellinger maintained an institute for the cure of whisky and drug patients in Seattle, and that Moore investigated the cure and that no false representations were made to Moore.

Crane also testified that he delivered the stock to Moore and collected his note. He was corroborated by his daughter, Mrs. Beasley, who testified that her father delivered the stock in her presence and received Mr. Moore's note for $5,000.00, and that she immediately wrote a letter, sending it forward to Council Bluffs to the Citizen's State Bank and that her father did not see Mr. Hannan from the time when he first became acquainted with Mr. Moore until after the maturity of the original note.

It also appeared from the testimony of Mr. Crane that upon the maturity of the original $5,000.00 note, the Citizen's State Bank took a note from Mr. Moore, payable directly to the bank without Crane's knowledge or consent, and that he objected thereto and demanded to be released as soon as he learned of it, and was released from his primary indebtedness to the bank.

At the close of the evidence plaintiff in error moved the Court to instruct the jury peremptorily to return a verdict in favor of the plaintiff in error for the full amount of the notes in suit, principally upon the ground that the evidence of the witness Hannan, which was all the evidence relied upon by the defendant in error, was insufficient to show any knowledge or notice on the part of the Citizen's State Bank of any alleged fraud or misrepresentation of the original note. And also upon the ground that by accepting the renewal note fro mMr. Moore, payable direct to the Bank, there was a novation and sufficient consideration for the new note, and that the new note was purged of any infirmity in the consideration for the old one.

This motion was by the Court denied and exception saved and the case was submitted to the jury upon the two questions as to whether or not there had been any fraud or misrepresentation and swindle practiced upon

Mr. Moore in the original deal, and if so, whether Hannan, who had admittedly acted for the Citizen's State Bank, had sufficient knowledge of the nature of the transaction to impeach the paper in the hands of his bank.

The verdict was rendered for the defendant and the plaintiff in error interposed a motion for judgment notwithstanding the verdict, basing it principally upon the grounds above stated.

The Court denied the motion, and also a subsequent petition for a new trial. Thereupon this writ of error was sued out, assigning the following errors:

ASSIGNMENT OF ERRORS.

I.

That the United States Circuit Court in and for the Western District of Washington erred in overruling the objection of the plaintiff in error to the introduction of any testimony in support of the third alleged affirmative defense pleaded in the answer of the defendant.

II.

That the Court erred in overruling the objection of the plaintiff in error to the introduction of any testimony in support of the fourth alleged affirmative defense pleaded in answer of the defendant.

III.

That the Court erred in overruling the objection of the plaintiff in error to the question propounded to the witness Moore upon the stand, as follows:

"Q. Now, I will ask you if you subsequently entered into any business transactions with Bellinger and Crane

with reference to acquiring the formula for this remedy, and if so what; state fully the details of the business which you did with them;" and to the answer to said question, which is as follows: "A. These gentlemen interested several parties in Seattle; I think I can recall them. One was Angus Mackintosh, then in the Merchant's National Bank; Mr. C. G. Austin, Judge Ira Bronson and myself, in this remedy, and a company was organized to manage the business. I was to have a certain interest in the stock, a certain interest in the company, and Mr. Bronson was, I think, to have a fifth interest. I do not believe I ever received the stock. And I was to give my note for $5,000.00, due, I think, in six months, which I did. Messrs. Crane and Bellinger had a sale on for the State of California at the time, they claimed, for $20,000. This sale was practically all made, excepting they had to go down there to demonstrate the value of the remedy, which they said if it went through the money would be in and my share of it would be enough to pay the note before it was due. If they made the sale the money was never turned anywhere excepting to themselves, as it never came into the company. I went into the business with them in good faith, believing that they had a specific and a sure cure for all the drug habits and the liquor habit. I entered into it in absolute good faith, as did the other gentlemen in the company. I went East to Massachusetts accompanied by Mr. Bronson, and with positions (physicians) secured, offices were opened up to prove the efficacy of the remedy. We first opened in Massachusetts and were there for some time. * * * * * We only met with partial success there. Dr. Bellinger insisted that it was the physicians' fault that the cures were not made; and we finally asked him to come on himself—which he did—on to Boston; but he was partially successful only. He then suggested that we try in Chicago, and we opened a sanitarium in Chicago; I putting in up to that time over Ten Thousand Dollars in cash. But that was only partially successful, and was left in the care of physicians there. I remained with the company perhaps a year and a half in various attempts to

make the thing a success; but after that length of time I was convinced that it could not be made a success, and I abandoned it with the loss of a great deal of money."

IV.

That the Court erred in overruling the objection of the plaintiff in error to the question propounded to the witness Ira D. Bronson on behalf of the defendant in error, as follows: "Were you present at any negotiations between Crane and Bellinger with Mr. Moore?" and to the answer thereto: "A. About the first of March, 1895, at the request of Mr. Moore, I went with him to an institute, so-called, that was operated by F. P. Bellinger and George J. Crane. * * * I say about the first of March, I, at the request of Mr. Moore, went to an institute, a so-called institute that was operated by a Mr. George J. Crane and F. P. Bellinger to investigate the value and efficacy of a certain formula and remedy, as we called it, for the cure of the habit of tobacco, alcoholism, morphia and cocaine. At that meeting we met Mr. Bellinger; I think Mr. Crane was there at that first meeting—that is my impression, I think I saw him. I stated to Mr. Bellinger what I had come for, and he at once told me—I cannot give you the language; no, I cannot do that, but I can give you the substance of it. * * That is many years ago. He said that he had a remedy that his father discovered while he was a surgeon in the German Army; that while his father was there in that position he had quite a number of soldiers who were addicted to alcoholism, and he searched to find a cure, and at last discovered a herb from which he concocted and with other things a remedy which acted very nicely and cured the patients which he had, the soldiers. Some time after, how long I don't know, that remedy came into his possession, whether by gift, purchase or otherwise I don't know, but he was

the owner of it, and that after he became the owner of it he experimented with it and spent years, a good many years, in experimenting and perfecting it, and to that extent that it would not only cure alcoholism, but also the tobacco habit, and finally the morphia habits. In our conversation I asked him whether he was the owner of it or not. He said he was. Then I asked him about the efficacy of it, what it would do. He reiterated that it would cure these habits. Then I asked him what length of time it would take to cure them, and he said the tobacco habit could be cured in from ten days to three weeks, and my recollection is he said that some few cases he had cured even in a week. That I am not absolutely positive of, whether it was he or Mr. Crane said that, but I think it was Mr. Bellinger. Then I asked him if that was a cure, was a permanent cure. He said, 'Oh, yes,' they never wanted to use tobacco afterwards. Then I asked him how long it would take to cure the alcohol habit. He said from two to three weeks, possibly four, ranging from two to four weeks, and that that was a positive cure also. Then I asked him in regard to the liquor habit—I mean the morphine habit. He said that that would take from four to six weeks. I asked him if he had had any very severe, serious cases. 'Many,' he said. I asked him if he always cured them. He said he did. I asked him what length of time. He said, 'From four to six weeks.' Being a little sceptical, I asked him further, 'Are you sure that you can cure the worst habit —the worst patient, those who had been addicted the longest, in six weeks?' 'Yes,' he said, 'almost all cases, but there may be once in a great while a case that would take eight weeks, but that would cure any, absolutely any case.' That, I think, was all that we had at that meeting in relation to that, I mean by that, that that is

all I remember;" and in permitting the said answer to go before the jury.

V.

That the Court erred in sustaining the objection of the defendant in error to the following question propounded by the plaintiff in error to George J. Crane, on behalf of the plaintiff in error: "Q. Mr. Crane, after the note was renewed, the note for $5,000.00 was renewed by Mr. Moore, payable directly to the Citizen's State Bank, state whether or not the bank released you from liability to them;" and in overruling the offer of the plaintiff in error of certain testimony, as follows:

"Mr. Keifer.—What I want to show, if your Honor please—I want to make a definite offer to show that the bank, after acquiring this note, that is the original Moore note, for $5,000.00, as collateral security for the obligations of the witness on the stand to the Citizen's State Bank, the then holder of this original Moore note, without the knowledge or consent at that time of this witness on the stand, extended the time of payment at the request of the defendant Moore, and then subsequently took the note of the defendant direct to the Citizen's State Bank without the consent of the witness on the stand, and that thereupon the witness claimed to be released, and the bank released him in pursuance of that;" and in overruling the offer of the plaintiff in error, as follows:

Mr. Keifer.—No, we do not. I want to make an offer now, if the Court please. I want to prove by the witness on the stand that when he learned of the bank having accepted the note direct from Moore, that in lieu of the one by him delivered to the bank as collateral security, the original $5,000.00 note that he objected to the action of the bank and demanded to be released, and that the bank did release him from all except—released him personally and all his property except the Moore note, and agreed to look wholly to the Moore note for the indebted-

ness for which the Moore note had been given as collateral. That is what I offer to show. And to follow it up by proof of the identity of the date (debt) for which the Moore note was given as collateral security—the original Moore note, I mean.

The Court—That does not indicate to me when that occurred.

Mr. Keifer—As soon as he learned it from Mr. Moore, in 1893, of the acceptance by the bank of his, Moore's, note, direct to the bank.

The Court—The only inference I can draw from that is that that was after the maturity of the note.

Mr. Keifer—It was after the maturity of the note; as soon as this witness learned of the action of the bank from Moore.

Mr. Gilman—We object to that if the Court please. (Objection sustained by the Court, and an exception allowed to the plaintiff.)

VI.

That the Court erred in denying the motion of the plaintiff in error for a peremptory instruction to the jury directing the jury to render a verdict in favor of the plaintiff for the full amount of the plaintiff's claim.

VII.

That the Court erred in refusing the request of the plaintiff for the following instruction:

"Under all the law and evidence in the case, the jury are instructed to return a verdict in favor of the plaintiff for the full amount of the notes pleaded in plaintiff's amended complaint, with interest from date at the amount stipulated therein, to-wit, eight per cent per annum, to be compounded semi-annually."

VIII.

That the Court erred in refusing to give the jury, at the request of the plaintiff in error, the following instructions:

"If the jury find, from the evidence, that the defendant, in making said contract with George J. Crane and F. P. Bellinger, in March, 1893, for the purchase of stock in the Bellinger German Remedy Co., for which said $5,000.00 note was given, relied upon his own investigation of the merits of the alleged cure for the liquor, drug and tobacco habits, then no defense has been made out in this case, and the verdict should be for the plaintiff for the full amount of the plaintiff's claim.

The defendant cannot set up the failure of Bellinger's cure for the liquor, drug and tobacco habits to work out as he expected, unless in making the contract for the purchase of stock in the Bellinger German Remedy Co., he relied wholly and entirely upon the representation of Crane and Bellinger that the said cure was a success."

IX.

That the Court erred in refusing to give the jury, at the request of the plaintiff in error, the following instruction:

"If the jury find, from the evidence, that the contract of F. P. Bellinger and George J. Crane for the transfer of the Bellinger remedy for the liquor, drug and tobacco habits, was made with the Bellinger German Remedy Co., a corporation, then the defendant has not made out his defense, and the verdict must be for the plaintiff for the full amount claimed."

X.

That the Court erred in refusing to give the jury, at the request of the plaintiff in error, the following instructions:

"If the jury find from the evidence that F. P. Bellinger and George J. Crane, in March, 1893, honestly believed that said Bellinger possessed a cure or remedy for liquor, drug and tobacco habits, and their experience with the use of the same led them to believe that the same was a good cure, and they honestly represented to the defendant that it was a good cure, the failure of such cure to work perfectly after a long trial would be no defense to the defendant in this action.

If the jury find from the evidence that Crane and Bellinger honestly believed that they had a good and successful cure for the liquor, drug and tobacco habits, in March, 1893, and in good faith, believing in said cure, organized a corporation known as the German Remedy Company, and sold to the defendant one-fifth of the stock of said corporation, for his said note for $5,000.00, although it eventually turned out that said cure could not be made a medical and commercial success, the failure of the same to prove a medical and commercial success would not afford any defense to the defendant, and the verdict of the jury should be for the plaintiff for the full amount sued for."

XI.

That the Court erred in giving to the jury the following instructions:

"Now, gentlemen of the jury, there is a question in the case as to which there is a conflict of testimony, and it is referred to the jury to decide what the truth about it is, whether there was any knowledge on the part of the cashier, or whoever acted for the Citizen's State Bank of Council Bluffs at the time of receiving that $5,000.00 note. It is shown by uncontradicted evidence that the transaction was through Mr. Hannan, who was an officer of that bank at that time, and whose deposition has been taken in this case. Mr. Hannan will be presumed, as the result of uncontradicted testimony in the case, to have been authorized to act for the bank in that matter, and any knowledge or information which he had on the subject

is to be imputed to his principal, the bank for which he was acting, and the jury must determine this question of whether he knew of the fact that Mr. Moore had been swindled (if in fact he was swindled) in the transaction by which the note was obtained from him. In determining the question you are to consider all the facts and circumstances attending the transaction and showing what knowledge Mr. Hannan did have in regard to the maker and the payees of the note and in regard to their dealings together with respect to that note and the circumstances under which the note was obtained and determine from a consideration of the testimony whether the evidence shows that Mr. Hannan did know of enough of the transaction to have put a prudent man on inquiry before accepting the note as a purchaser of it in good faith. The bank is chargable not only with the knowledge which Mr. Hannan actually did have, but if there was some knowledge on his part which should have been a warning to him, and would have caused a prudent business man to have made inquiry, then the bank is chargeable with all the knowledge that might have been obtained by an inquiry, and if there was a swindle practiced, and the bank, through Mr. Hannan, knew it, or should have known it, then the note was equally void in the hands of the bank as in the hands of Crane and Bellinger, and if void in the hands of the Citizen's National Bank, it is likewise void in the hands of the plaintiff bank."

XII.

That the Court erred in giving to the jury the following instruction:

"I charge you that if the original note given by the defendant in this case to George J. Crane, was without consideration and was obtained by said Crane from the defendant by false and fraudulent representations made by said Crane or his associate, Bellinger, to the defendant, and the defendant signed said note, relying upon such representations and believing them to be true, then

said note was invalid in the hands of Crane and Bellinger, or either of them, and they would have no right to recover from the defendant thereon. I charge you that if said Crane and Bellinger, or either of them, represented to the defendant that they, or either of them, owned a secret formula from which a medicine could be compounded, that was a specific for and would cure the morphine, cocaine, liquor and tobacco habits, and if said representations were made for the purpose of inducing the defendant to sign said original note in order to purchase an interest in said formula, and if the defendant, relying upon said representations, and believing them to be true, and so relying and believing, signed said original note, and if, as a matter of fact, said defendants did not possess any such formula, or if the formula so claimed to be possessed by them was not a specific or cure for said habits, and the said Crane and Bellinger, or either of them, knew that they possessed no such formula, or knew that any formula owned or possessed by them was not a specific or cure for said habits, then I charge you that such action on the part of Crane and Bellinger would amount to fraudulent misrepresentations, and said note would be without consideration and void in the hands of Crane and Bellinger. I charge that if said not was obtained by said Crane and Bellinger, or either of them, from the defendant without consideration, and by false and fraudulent representations, and the Citizen's State Bank had notice or knowledge of said fraud and lack of consideration, at the time said note was transferred to it, then the rights of said bank in this note would be no greater than those of Crane and Bellinger, and under such circumstances said bank could not recover thereon.

I charge you that notice or knowledge on the part of a cashier of a bank who acts for it in a transaction is, in law, notice or knowledge to the bank itself.

The plaintiff sues as the assignee of the notes in controversy, and it has no other or greater rights than the assignor, the Citizen's State Bank, and if said bank could not recover, then plaintiff cannot recover."

XIII.

That the Court erred in giving the jury the following instruction:

"I charge you that if you shall find under the instructions that I have heretofore given you that the original note was fraudulent and without consideration in its inception and that at the time of its transfer to the Citizen's State Bank, this fact was known by that bank, or by its cashier who acted for it in the purchase of the same, and that the renewal notes which are the subject of the suit in this action were executed by the defendant without notice of the original fraud, if any, practiced on him, or if said renewals were obtained from the defendant by false and fraudulent representations made by the said bank, or its cashier, to the defendant, to the effect that said note had been acquired for value without notice in the due course of business, then I instruct you that your verdict must be for the defendant."

XIV.

That the Court erred in giving the jury the following instruction:

"In the progress of the trial and in the discussion of the case, complaint has been made that there was a new liability created by novation. The Court instructs you that there was not any liability created by novation. A novation is a contract that requires three parties and the minds of all three must meet and be in accord so as to effect a novation. That would occur in a case in which we will say A (supposing that to represent a person) is indebted to B and B is indebted to C, and they all agree that A shall become liable to C for the debt of B, and B releases A from any further obligation to him, and C accepts A in the place of B and releases B from any obligation to him. That constitutes a novation. You see it requires the concord of three minds."

XV.

That the Court erred in giving to the jury the following instruction:

"I charge you that if you shall find from the evidence that said note was fraudulent and without consideration in its inception, then the burden of proof is upon the plaintiff to establish by preponderance of evidence that the Citizen's State Bank was a bona fide holder of said note, and if you shall find from the evidence that the said note was fraudulent and without consideration in its inception, and shall further find that the plaintiff has not established by preponderance of the evidence that the same was taken in due course of business without notice of such fraud, then your verdict must be for the defendant."

XVI.

That the Court erred in denying the motion of the plaintiff in error for judgment notwithstanding the verdict, and in rendering and entering judgment herein in favor of the defendant in error for costs, and that the plaintiff in error take nothing by its action.

BRIEF OF THE ARGUMENT.

We will discuss our first and second assignments together. They are found in the record at pages 164-165. The affirmative defenses referred to are found at pages 16 to 22 of the record. They are practically the same, alleging the representations of Crane and Bellinger as to the ownership and character of the formula for the cure and the efficiency of the cure and the formation of the Bellinger German Remedy Co. to exploit the same, and the giving of the original $5,000.00 note for the one-fifth interest in the $1,000,000.00 capital of the corporation.

It is further alleged that Crane and Bellinger agreed to transfer and pretended to transfer the formula to this corporation. It is nowhere alleged that the defendant was in any wise damaged in any amount.

In order to set up a defense the pleader should have gone further and clearly and distinctly set out the amount and character of the defendant's damage, and pleaded it as a counterclaim.

Gruniger vs. Philpot, 5 Bissell 82.
Packwood vs. Clarke, 2 Sawyer 546.

The objection of the plaintiff in error should have been sustained upon another ground. The defenses in question show that the contract was completely executed on both sides, and there is no offer or tender of recision.

Herman vs. Gray, 48 North Western 113.
Bisbee vs. Torrinus, 2 North Western 168.

For our objections to the offer of the testimony under these defenses and our exceptions, see record 49.

II.

Our 6th, 7th, 14th and 16th assignments we will discuss under the same head, as they raise the same or cognate questions. The assignments themselves are found on pages 171-177 and 178 of the record.

We submit that upon all the evidence, as well as upon all of the controlling facts in the cause, plaintiff in error should have had judgment for the full amount of its claim, and we will endeavor to present in appropriate subdivisions the details of our contention:

(a) The defendant in error relied upon the testimony of the witness Hannan, the former cashier of the

Citizen's State Bank, to show knowledge on his part at the time when Crane endorsed to the bank the original $5,000.00 note, of the nature and character of the transaction between Crane and Bellinger and the defendant in error. Let us see just what Mr. Hannan does say. His testimony is shown in full on pages 56 to 65 of the record, but all that he says that may be claimed to have any bearing upon this proposition may be stated in a few words in the language of the witness: "Mr. Crane had fully explained to me just what he was doing—explained what they tried to do in Denver, San Francisco and other places before they went to Seattle, and I was fully advised at all times as to what he was doing. I knew full well what the note was given for, it having been given for the recipe and privilege of using the recipe for an opium and whiskey cure. I state that I knew all about the consideration for the original note." At another place he says: "I had learned from Mr. Crane of the transaction he had with Mr. Moore and he had advised me of the details of the deal, and that he had Mr. Moore's note."

This is the testimony relied upon by the defendant in error to show knowledge on part of the Citizen's State Bank, at the time the bank took over the original note from Crane.

We submit that it is wholly insufficient. It is the settled law in the Courts of the United States that one who acquires mercantile paper before maturity from another who is apparently the owner, giving a consideration for it, obtains a good title, though he may know of facts and circumstances that would cause him to suspect or would cause one of ordinary prudence to suspect that the person from whom he obtained it had no interest in or authority

to use it for his own benefit, though by ordinary diligence he could have ascertained these facts.

Goodman vs. Simons, 20 Howard 343.
Kaiser et al. vs. First National Bank of Brandon, 78 Federal 281.

A very controlling case is that of *Doe vs. North Western C & T. Co.*, 78 Federal 62.

In that case notes were made by a corporation in favor of its president for alleged services under such circumstances that the Court found that they were fraudulently given and without consideration. A part of these notes were turned over as collateral security for an existing indebtedness and as indemnity against liability as surety for the payee in the corporation notes.

It further appeared that the endorser of these notes knew that the notes were executed by the corporation to its president and used by him in securing his individual debt. This fact was relied upon as a defense to the note, and the Court says that it is a well settled rule of the Federal Courts that the purchaser of a promissory note is not deprived of his rights as a purchaser in good faith by proof of knowledge of such circumstances as to put an ordinarily prudent man upon inquiry to ascertain the facts. The proof must go further and show that at the time of the transfer knowledge of facts that would impeach the title as between the antecedent parties to the note, or knowledge of such facts that his abstention from further inquiry will be tantamount to a wilful closing of the eyes to the knowledge which he knows is available, and therefore presumptive evidence of bad faith upon his part. In this case it even appeared that the endorsee was a director in the corporation issuing the notes.

King vs. Doane, 139 U. S. 166 is very much in point.

Israel vs. Gale, Receiver, 174 U. S. 391, is a well considered case. Where notes were made in favor of a firm simply as accommodation paper on the part of the maker, and one of the partners in the payee firm was president of a bank, and the notes were endorsed by the payee firm and also in the name of the bank. The notes were taken by the president of the bank and negotiated for his individual debt, he claiming to be the owner of them. The makers defended upon the ground that the endorsement of the bank upon the notes, together with knowledge that the person offering the notes for discount, was the president of the endorser bank did not afford any notice sufficient to affect the rights of the bona fide holder.

Kaiser vs. First National Bank of Brandon, 78 Federal 281.

We submit that the testimony of Hannan does not show any knowledge. He states his conclusions and no facts. Upon this point we cite:

Bank vs. Stadleman, 26 Atlantic 201.
Clarke vs. Evans, 66 Federal 263.
Atlas National Bank vs. Holm et al, 71 Federal 489.
Collins vs. Gilbert, 94 U. S. 753.
Swift vs. Smith, 102 U. S. 442.
O'Brien vs. Union Pacif. Ry Co., 161 U. S. 451.
Corbin vs. Ditch Co., 17 Col. 146.
Vaughn vs. Strong, 21 N. Y. Suppl. 550.
Bank of Chelsea vs. Isham, 48 Vt. 590.
Wolf vs. Arthur, 16 S. L. 845.

Taking the testimony of Hannan as strongly as possible in favor of the defendant in error, it does not disclose any knowledge on his part of any fraudulent transaction. The sale of the preparation or the recipe for making the preparation for the cure of whiskey and drug

habits is not an unlawful transaction. The fraud and illegal act, according to the contentions of the defendant in error, consisted in the false and fraudulent representations of Crane and Bellinger to Moore. Of this Mr. Hannan does not claim to have had any knowledge. He testifies to nothing beyond knowledge of the nature of the business in which they were engaged. The business was a legal one, and he does not claim to have known anything of any illegal way of doing it. There is no presumption that the transaction, legal in itself, was carried out in an unlawful manner.

Davis vs. McReady, 17 New York 230.
Mitchell vs. Catchings, 23 Fed. 710.
Loomis vs. Mowry, 15 N. Y. S. C. 312.
Borden vs. Clarke, 26 Mich. 412.
Miller vs. Finley, 26 Mich. 249.
Patten vs. Gleason, 106 Mass. 439.
Kelly vs. Whitney, 45 Wis. 110.

In these cases the rule is laid down that there is no presumption of fraud in the manner of doing lawful business, and even extends its protection to patent right notes and notes showing on their face that they were given in payment for warranted machinery. See also:

Tiedeman on Commercial Paper, Sec. 300.

As to the right of one taking commercial paper as collateral security for an existing indebtedness to be considered a purchaser for value we cite:

Railroad Company vs. National Bank, 102 U. S. 25.

(b) The defendant in error pleads affirmatively that the notes in suit are renewals of the original note made in March, 1893, for $5,000.00 in favor of Crane, and that the original note was first renewed direct to the bank,

and then subsequently renewed from time to time directly to the bank. The undisputed fact in the case is that the bank got the original note before maturity.

Plaintiff's exhibit "R" (record 108) shows the history of the first renewal. The effect of this renewal, as we understand it, was to purge the original note of the alleged fraud in its inception. The bank changed its position with regard to the paper from that of endorsee to payee, and released Crane, both as endorser of the Moore note, and upon his primary liability for his indebtedness to the bank. (Record, 126 line 9 et seq.)

According to Moore's letter the arrangement was that Crane be released. The new note was certainly upon sufficient consideration, the old one being surrendered (record 109). Moore testifies (record 118) that he was unable to pay the note, and certainly the surrender of the old one and the extension of time constitute a good consideration and make it a new contract.

Wyman vs. Faben, 111 Mass. 77—

Is very much in point. In that case the note was lost, and just before the same would be barred by the Statute, a renewal was given to prevent the running of the Statute. The maker was afterwards discharged in insolvency proceedings under a Statute passed between the making of the two notes. In an action upon the renewal note it was held that it was a complete contract within itself upon a new consideration, and that the maker was discharged by the insolvency proceedings.

Several notes executed by principals and sureties were sold to a bank by the payee. At maturity the notes were taken up by a bill of exchange made between some of the parties to the note with the consent of the bank, and

in an action on the bill it was held that the consideration for the original notes could not be inquired into.

Estep vs. Burke, 19 Ind. 87.

A maker indebted to a bank in the amount of a note, at the request of the bank gave several new notes. Between the time of giving the original and the new notes he had acquired a homestead, which he claimed to have set apart to him in bankruptcy proceedings. Under the laws of Missouri a homestead could not be acquired as against existing debts. The Court held that the new note was a new contract, and that the old was completely discharged and set aside to the maker of the notes his homestead.

In Re Dixon, 13 Fed. 109.

Upon this point we also cite:

Doherty vs. Bell, 55 Ind. 205.
Rindekoff vs. Doman, 28 Ohio St. 516.
Lyons vs. Plullife, 106 Pa. St. 57.
Smith vs. Smith, 35 Pacific 697.
Keyes vs. Mann, 63 Iowa 560.
Kidder vs. Horrobin, 72 N. Y. 159.
Call vs. Palmer, 116 U. S. 103.
Railroad Company vs. Bailey, 18 Ohio St. 208.
Burke vs. Tisdale, 84 N. Y. 655.
Powell vs. Smith, 66 N. C. 401.
Clough vs. Holden, 20 South Western 695.
Atlanta Natl. Bank vs. Haley, 19 Southern 522.
Stone vs. McConnell, 1 Duv. (Ky. 54).
Gottzmer vs. Pierce, 13 Philadelphia 88.
King vs. Doane, 139 U. S. 166.
Buchannan vs. Bank, 55 Federal 223.
Randolph on Commercial Paper, Sec. 1583-1812.
Daniel on Bills and Notes, Sec. 205.

Counsel for defendant in error contended upon the trial below that the act of Hannan, Cashier of the Citizen's State Bank, in representing to Moore that the bank was the owner of the paper for value without notice and in the ordinary course of business, was a fraud upon Moore. There is nothing in the testimony of Hannan, (Record 59), of Moore (Record 93), which shows anything beyond the bare assertion of the bank's right as bona fide holder. It is not contended that Moore was a customer of the bank and that the parties dealt otherwise than adversely and at arm's length.

Moore had put his paper in circulation, and when he found it in the hands of the bank and the bank asserted its rights as a bona fide holder, was it not the duty of Moore to fully inform himself before acting upon this claim? Moore says in his testimony that he did not know at that time that he had been swindled, as he now alleges, and did not discover it until nine years later. How, then, could Hannan's assertion of the Bank's rights affect him?

Counsel for defendant cited no authority at the trial, and a laborious search on our part has not revealed any case in point.

(c) We contend that our motions for a peremptory instruction and for judgment, notwithstanding the verdict, were well taken upon the ground that the defendant's own testimony shows that there was a novation. The letter of the defendant (plaintiff's exhibit "R" record 108) shows that the defendant procured the release of Crane from his alleged liability as endorser of the original $5,000.00 note of the defendant, and the testimony of Crane (Record 126, line 9 et seq.) shows that he was released by the bank not only from liability as indorser, but from his liability upon his primary indebtedness to the bank for which this Moore note had been taken as

collateral. It would hardly be disputed that if Crane and Moore had met Mr. Hannan acting for the bank, and a transaction such as here appears had taken place with the consent of all three, that it would have constituted a novation. Certainly no one would gainsay that. What difference can it make that Crane was not present, if he ratified it as soon as he heard of it? The transaction inured to his benefit, and instead of disaffirming it, he ratified it and insisted upon his rights. We do not understand the law of novation to be that all three of the parties must be present at the time, but that a novation can be accomplished by two of them if their act be afterward ratified by the third party. The ratification relates back to the transaction.

21 *American & English Ency.* 669.
Wellington vs. Scott, 2 Rob. (La.) 59.
Moore vs. Wilcoxen, 30 South Western 612.
N. A. Development Co. vs. Short, 13 Southern 385.

The payee of a note directed the maker to execute a new one to her son, and upon this being done, surrendered the old one to the maker. Held to be a novation.

Fehnsenfeld vs. Crockett, 41 Atlantic 66.

Gates being indebted to Casey, gave Casey an order upon one Miller for $315.00. Casey agreed to release Gates if Miller accepted the order. Miller paid $45.00 on account and accepted the order, and Gates was released by Casey. In an action afterwards brought by *Gates vs. Miller* this was held to be a complete novation, and Miller released.

Gates vs. Miller, 32 Pacific 195.

A plaintiff recovered judgment against his debtor, issued execution and when about to levy upon the judg-

ment debtor's property he accepted a note and a mortgage from the judgment debtor's vendee payable in 10 days. The note and mortgage not being paid he undertook to enforce his judgment against the judgment debtor. It was held that there was a complete novation, and that the original judgment debtor was released, and that as to him the judgment was paid and satisfied.

Union Stove Works vs. Caswell ,16 L. R. A. 85.
See *McLaren vs. Hutchinson,* 22 Cal. 188.

(d) The plaintiff in error was entitled to a peremptory instruction and to the granting of its motion, notwitstanding the verdict upon a fourth ground. The complaint of the defendant in error is that Crane and Bellinger defrauded him by failing to turn over to the corporation the formula for the cure. It will be remembered that the defendant in error proved by his own testimony that the Bellinger German Remedy Co. was formed (Record 100-101) and plaintiff's exhibit "P" (Record 70) that the contract on the part of Crane and Bellinger to turn over the formula was reduced to writing, and was between them and the Bellinger German Remedy Co., a corporation.

Moore swears (Record 91) that he did not know until after the commencement of this suit, or about the time that it was commenced, that the formula was not placed in the safe deposit box, and in his pleading (Record 22) that he did not discover that Crane and Bellinger had no formula until 1902. In his testimony (Record 110) and plaintiff's exhibit "S" (Record 111) it is shown that defendant in error continued in the business until March, 1895, and (Record 123) he says that he took a year and a half or more to discover that he could not succeed with it.

We have, therefore, this proposition: The defendant

in error sought to avail himself of a breach of the contract between the corporation and Crane and Bellinger. He certainly cannot avail himself of any breach of the contract between the corporation and Crane and Bellinger. The remedy for that breach must be pursued by the corporation, and not by the individual stockholder.

In the next place the defendant in error pleads that the stock constituted the consideration for the original note, while his evidence shows that the failure of Crane and Bellinger to deposit the formula in the safe deposit box had nothing whatever to do with the failure of the company or the depreciation of the value of the stock. His evidence shows that Dr. Bellinger furnished all the medicine called for, and that he experimented fully with the cure, and that the failure to have the formula locked up in the safe deposit box in Seattle did not in any way contribute to the failure of the concern. According to Moore's own testimony he did not know until 1902 that they had no formula, some six or seven years after the company had suspended operations. How was he in any wise damaged by the failure of Bellinger to deposit the formula?

III.

Our fourth assignment of error raises the question of the admissibility of the evidence of the witness Bronson. The assignment itself is found on page 166 of the record. See also Record 67. The contract made by Crane and Bellinger was made in writing with the *Bellinger German Remedy Co.* Clearly the negotiations of Moore and Bronson acting for the intended and proposed corporation and Crane and Bellinger, acting for themselves, became and were merged in the articles of incorporation, and the written contract entered into between the corporation on the one side and Crane and Bellinger on the other, and it

was error for the Court to permit the defendant in error to bring before the jury all these prior negotiations and conversations.

Our objections were well taken upon another ground: The contract was not between Moore and Bellinger, but between the corporation and Crane and Bellinger, and the remedy for a breach of it or fraud in making it, it was for the corporation, and Moore can not avail himself of either the breach of the contract or fraud in its making.

IV.

Our fifth assignment of error is found at page 169-170 of the record. Our offers and exceptions appear in the bill of exceptions at pages 148 and 152 of the record.

In substance our offer was to show that when George J. Crane learned that the Citizen's State Bank had accepted Moore's note payable to themselves, he insisted upon his right to be released, and affirmed the action of the bank. The act of the bank clearly had released him, and he was simply insisting upon his rights flowing to him from the act of the bank. Our object in introducing this evidence was to show that Mr. Crane in assenting to this arrangement was completing and establishing a novation of the debt. After excluding this evidence, which would clearly have established a novation, if not already established, as we contend it was, the Court peremptorily instructed the jury (Record 156) that the question of novation was not before them. To this we duly saved our exception (Record 159).

> *Encyc. Law*, Second Edition, Vol. 21, page 669, Art. Novation.

It was also admissible as showing a sufficient consideration for the renewal of the note or notes. The letter

of the defendant in error (plaintiff's exhibit "R" record 108) shows that it was the arrangement between the bank and Moore that Crane should be released, and surely we were entitled to show that Crane availed himself of and consented to the arrangement, thus completing the consideration for the new notes.

V.

In our fifth and eighth requests (Record 146-47) we asked the Court to instruct the jury substantially that if the defendant in making his contract with Crane and Bellinger in March, 1893, for the purchase of the stock in the Bellinger Germany Remedy Co., for which the original note was given, relied upon his own investigation of the merits of the cure, the defense was not made out. This request the Court refused, and this forms the basis of our eighth assignment of error. (Record 171.)

We contend that this assignment is well taken. The defendant in error had requested the Court to instruct the jury that if the note was made relying on Crane & Bellinger's false representations, the note was void unless plaintiff in error was the holder for value before maturity without notice, and the Court did so instruct. Now we had a right to have our theory of the case put to the jury. It can scarcely be contended that the instructions requested incorrectly state the law applicable to the case. No matter what representations Crane and Bellinger may have made, whether true or false, if the defendant in error made an investigation of the merits of the proposition and relied upon it, their representations would afford him no defense. There was abundant evidence to justify this instruction, for the defendant had proved by the evidence of the witness Bronson and his own evidence that he had investigated fully and thoroughly even to the extent of consulting physicians (Record 67-74-88-99-100).

VI.

The Court was asked in our seventh and ninth requests (Record 147) to instruct the jury in substance that if Crane and Bellinger from their experience with this cure believed it to be a good one and made their representations to Moore in good faith, such representations would not afford a defense, even though the cure might not work out to a medical and commercial success. The Court refused to give this instruction, and our tenth assignment of error is predicated upon this refusal. It is quite plain from the history of this entire transaction that what Moore was after and what induced him to go into this trade was the cure itself and not the mere formula. According to his own testimony he had abundant opportunity to try the cure, and he was at least partially successful (Record 90-100-118-123), and according to the evidence of the witness Crane (Record 124-125-127) and Bellinger (Record 53 and 131) their experience with it led them to believe, and they did honestly believe, in the efficacy of the cure. Moore was not injured by the fact that a certain paper formula was not left in the safe deposit vault in Seattle. According to his story the company had suspended operations years before this interesting discovery was made, and according to his story, and according to contract, the formula was not to be made known to the company.

The contract was that Bellinger was to furnish the medicines, and all parties seem to be agreed that he did furnish them so long as the Company kept up its operations. Moore's theory of the case was that he was defrauded by false and fraudulent representations of Crane and Bellinger as to the character of the cure. We certainly were entitled to have the alternative proposition put before the jury by the Court, viz.: That if Crane and Bel-

linger made to Moore representations in which they honestly believed, basing their belief upon their own experience with the cure, such representations would not constitute the fraud relied upon by Moore, even though they did not deposit a paper formula in safe deposit.

VII.

By our eleventh assignment of error (Record 173) we question the correctness of the Court's instruction as to the knowledge of Mr. Hannan, who acted for the Citizen's State Bank in taking the original $5,000.00 note from Crane as collateral security, that a swindle was practiced upon Moore. We submit that this instruction was wrong and prejudicial to the plaintiff in error, and that there is nothing in the record of the case to justify any such instruction as was given. After telling the jury that it was an undisputed fact that Mr. Hannan acted in the premises for the Citizen's State Bank, and that any knowledge or information which he had on the subject is to be imputed to the bank, the Court proceeds: "In determining that question you are to consider all the facts and circumstances attending the transaction, and showing what knowledge Mr. Hannan did have in regard to the maker and the payees of the note, and with regard to their dealings together with respect to that note and the circumstances under which the note was obtained, and determine from a consideration of the testimony whether the evidence shows whether Mr. Hannan did know enough of the transaction to have put a prudent man on inquiry before accepting the note as a purchaser of it in good faith. The bank is chargeable not only with the knowledge which Mr. Hannan actually did have, but if there was some knowledge on his part which should have been a warning to him and would have caused a prudent busi-

ness man to have made inquiry, then the bank is chargeable with all the knowledge which might have been obtained by an inquiry, and if there was a swindle practiced and the bank, through Mr. Hannan, knew of or should have known of it, then the note was clearly void in the hands of that bank as in the hands of Crane and Bellinger, and if void in the Citizen's National (State) Bank, then likewise void in the hands of the plaintiff bank."

(a) This instruction, in the first place, is not justified by the evidence. The defendant in error had offered Charles R. Hannan as a witness, and he must be presumed to have testified to his full knowledge and stated all that he knew. We have quoted his testimony on this subject in full above, and a careful examination of it (Record 56 to 65) will show that he says nothing beyond the bare fact that he knew Crane and Bellinger to be engaged in the sale of a cure for the whiskey and opium habits, and that this note was given in a trade of that kind. Now what other facts or circumstances were there for the jury to take into consideration? The defendant in error in the Court below relied upon the testimony of Hannan to take the case to the jury, and we contend that there is nothing in the record of Hannan's testimony or in that of anybody to justify the Court in telling the jury that they are to consider all the facts and circumstances attending the transaction between Crane and Bellinger and Moore.

Hannan was not in Seattle. It is not claimed that he took any part in the trade, and it is not disputed that the note was sent to him by mail. The defendant's own testimony shows that he learned that the bank had it while Crane and Bellinger were still on the Pacific Coast, and it was wholly wrong and highly prejudicial for the Court to tell the jury in effect that they could guess that Hannan knew about what took place in Seattle.

(b) The Court further told the jury that the bank is chargeable not only with the knowledge which Hannan acquired, but if there was anything in the knowledge which he did have which should have caused him to inquire, the bank is chargeable with what he should have found out. Now, suppose he should have inquired, what would he have learned? Moore swears that he was a year and a half or two years in finding out that the cure was not a success. He also says that he did not know until 1902 that the formula, the loss of which he now so bitterly bewails, was lost. This was some seven years after he got out of the business. His letter (plaintiff's exhibit "R", dated November 28th, 1893, record 108) shows that the note was renewed prior to that time, and it also shows that at that time Moore was very enthusiastic over his buy. So that inquiry from him would certainly have elicited nothing to impeach the paper. Crane and Bellinger swear now that they acted in good faith, and they no doubt would have said the same had inquiry been made of them. Hannan himself says nothing which shows a knowledge on his part which would or should have caused him to hesitate about taking the paper any more than in every day life thousands of men go to their bankers with paper to be discounted, and either volunteer the statement, or in response to an inquiry from the bank, they may say: "I got this in a real estate deal with so and so," or "I got this note of Brown for the sale of some hides," or "hogs," or "cattle," or "lumber," as the case may be. Suppose that A gets B's note for a sum of money and takes it to his banker and asks to have it discounted, or offers it as collateral security, as in this case, and says to his banker, "I sold B a piece of real estate and got that note in payment," and subsequently it should turn out that the title which A conveyed to B was defective, or that he had no

title at all, and swindled B, could the bank be required to hunt up the abstract of title or search the public records and find out the nature and character of A's title to the real estate which he sold to B? That is just the proposition here. It was no more unlawful for Crane to sell to Moore the cure for whiskey and opium habits than to sell him dry goods or groceries or a drove of cattle, and no presumption arises that he did it in an unlawful way.

There was nothing in Hannan's knowledge as testified to by himself to justify any such instruction.

(c) The Court incorrectly quotes the testimony in this instruction, thereby misleading the jury: "The payees of the note" and "the note was clearly void in the hands of that bank as in the hands of the Citizen's State Bank." It is a plain and undisputed fact that Crane was the only payee of the original note, and that Bellinger's name was never used in the note at all.

Finally this instruction was given in contradiction of all rules of the Federal Courts respecting commercial paper:

Goodman vs. Simmons, 20 Howard 343.
Kaiser et al. vs. First National Bank of Brandon, 78 Federal 281.
Doe vs. North Western C. & T. Co., 78 Federal 62.
King vs. Doane, 139 U. S. 166.
Patten vs. Gleason, 136 U. S. 439.
Collins vs. Gilbert, 94 U. S. 753.
Swift vs. Smith, 102 U. S. 442.
Clarke vs. Evans, 66 Federal 263.
Atlas National Bank vs. Holm, 71 Federal 489.
Mitchell vs. Catchings, 23 Fed. 710.
Railroad Co. vs. National Bank, 102 U. S. 25.
Burke vs. Stadleman, 26 Atlantic 201.

VIII.

Our 12th assignment of error (Record 175) is based upon the charge given to the jury as to the representations made by Crane and Bellinger.

We contend that this instruction as given was and is erroneous and prejudicial. It should be borne in mind that the defendant in error pleaded affirmatively that the consideration for the original note of which those sued upon are renewals was the purchase of $200,000.00 of stock in the Bellinger German Remedy Co., and that this company was formed for the purpose of exploiting the cure. It affirmatively appears by the contract entered into by the Bellinger German Remedy Co. (Record 70) and Bellinger and Crane that this formula which is spoken of in the instruction now under consideration was not to be made known to the company, and that all that the company was to get out of it was the use of the medicines. Moore and his witnesses agree that Bellinger furnished medicines as long as the company remained in business and had any occasion for them. There is no complaint that Bellinger and Crane did not furnish the medicines. The company started off in business and continued for about two years, all the time using the medicines of Crane and Bellinger furnished by them. It does not appear that the existence of the formula was questioned until about the time this litigation began for the enforcement of the notes in suit, and that the company had then been out of business, and all others in the business had abandoned it for some six or seven years. How then, can it be said that Moore personally and individually was damaged by the failure of the company to get possession of the written formula? The utmost that can be said of all the evidence upon the subject of the written formula is that Bellinger failed to disclose it in his testimony in such shape that

it could be put up by any person skilled in the compounding of medicines.

It also appeared affirmatively by the defendant's own testimony that Bellinger had put up and furnished medicines which were partially successful for the intended purpose.

We further insist upon our contention made before that the utmost that the defendant has shown is the possible breach of contract and misrepresentation of and in the making of the contract between the corporation and Crane and Bellinger, and that the remedy for the same is not available for this defendant, but the corporation must avail itself of its remedy.

IX.

Our 13th assignment of error is found at record 176. We submit that this instruction is wrong, especially that portion of it wherein the Court tells the jury as follows: "And that the renewal notes which are the subject of this action were executed by the defendant without notice of the original fraud, if any, practiced upon him." This instruction might readily be considered by the jury to mean that no matter how innocently the bank acquired the original note, if the defendant Moore renewed without knowing that any fraud had been practiced upon him, nevertheless such renewal would be open to the defenses here urged. This we submit was entirely wrong, because if the bank acquired the original note without notice he could not defend against that. If he could not defend against the original note, how could he defend against the renewal?

Furthermore, the concluding part of the instruction is erroneous and prejudicial. The testimony of Hannan relied upon by defendant to show knowledge upon his part of the alleged swindle practiced upon the defendant, shows affirmatively that he did not have any such knowledge as would deprive the bank of its standing as a holder for value before maturity. And that therefore no assertion of such

right as a bona fide holder made by him on behalf of the bank could operate as a false and fraudulent representation. There is no testimony to justify this instruction.

X.

In our fifteenth assignment (Record 178) we complain of the rule laid down by the Court as to the burden of proof. The Court told the jury: "I charge you that if you shall find from the evidence that said note was fraudulent and without consideration in its inception, then the burden of proof is upon the plaintiff to establish by preponderance of evidence that the Citizen's State Bank was a bona fide holder of said note, and if you shall find from the evidence that the said note was fraudulent and without consideration in its inception, and shall further find that the plaintiff has not established by a preponderance of evidence that the same was taken in due course of business without notice of such fraud, then your verdict must be for the defendant."

We submit that there was no occasion for this instruction, and that it was highly improper and prejudicial. It appeared from defendant's evidence that the plaintiff's predecessor in interest acquired the original note before maturity and in such manner as to give it full rights as a bona fide holder for value in due course of business unless the officer acting for the said Citizen's State Bank had knowledge of the alleged fraud and swindle, and the defendant in error, in undertaking to prove that the officer did have such knowledge, affirmatively established that he did not, hence there was no occasion for this instruction, and nothing in the record to justify or warrant the giving of it.

The plaintiff in error had met the issue by showing its standing as a bona fide holder for value before maturity, and the burden had shifted back to the defendant in error.

Davis vs. Bartlett, 80 Am. Dec. 375.

Bedell vs. Henning, 11 Am. St. Rep. 323.
Drover's Natl. Bank vs .Blue, 64 Am. St. R. 327.

We submit in conclusion that there was absolutely nothing to take this case to the jury; that the testimony of the witness Hannan, relied upon by the defendant in error to take the case to the jury, shows absolutely nothing to justify the submission of it to the jury, and that the judgment should be reversed and the case sent down with instructions to enter judgment for the plaintiff in error.

If we are mistaken in this, then we contend that an examination of the charge of the Court below will show that inadvertently, and without intending so to do, the Court became unduly impressed with the defense, and in submitting the case to the jury, unconsciously dwelt upon and magnified the defense, and gave the propositions of the defense an unwarranted and undue prominence before the jury, and ignored and minimized the theory of the plaintiff in error.

Taken as a whole it seems to us that the charge must make this impression upon this Appellate Court, and that it must be apparent to this Court that the trial Court unintentionally passed over and made light of the theory of the plaintiff in error, and that the jury must have imbibed from the Court the idea that the defendant in error had been made a victim of unscrupulous swindlers, and that the Citizen's State Bank participated in the swindle.

We submit, therefore, that the judgment should be reversed and that if the plaintiff in error is not entitled to judgment, it is entitled to a new trial.

Respectfully submitted,

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